LIM CHON JET & ORS v. WEE AI HUA & ANOR

COURT OF APPEAL, PUTRAJAYA
HAS ZANAH MEHAT JCA
LEE HENG CHEONG JCA
CHE MOHD RUZIMA GHAZALI JCA
[CIVIL APPEAL NO: S-02(NCvC)(W)-492-03-2019]
27 SEPTEMBER 2022

Abstract – *The language used in a contract of guarantee is vital. If the language is clear, its plain and ordinary meaning must be given. The background knowledge of the contracting parties must also be considered in determining the intention behind it. This includes anything which would have affected the way in which the wordings were used in the guarantee. Another element to consider is the nature of the dealings or the business involved. Where it is clear that the parties are involved in a commercial dealing, the language or the words used in the instruments has to be interpreted in accordance with business common sense and must meet the reasonable expectation of a sensible businessman.*

CONTRACT: *Agreement – Sale and purchase agreement – Guarantee/indemnity – Late delivery of houses and houses delivered defective – Claim for damages for breach of contract – Court awarded damages – Controller of housing ('COH') failed to pay judgment sums – COH assigned all rights under guarantee to purchasers via deed of assignment to enable purchasers to commence legal action against guarantors – Whether deed of assignment valid – Interpretation of guarantee – Whether claim barred by limitation – Housing (Control and Licensing of Developers) Rules 1980 – Civil Law Act 1956, s. 4(3)*

This was an appeal by the appellants ('plaintiffs') against the whole decision of the High Court Judge ('HCJ') in dismissing the plaintiffs' action seeking to enforce the statutory guarantee/indemnity against the respondents ('defendants'). In 2002, a developer company, Yusen Jaya Sdn Bhd ('Yusen Jaya') applied to the Controller of Housing ('COH') for, among others, a license to develop a housing project. Yusen Jaya was required under the provisions of the Housing (Control and Licensing of Developers) Rules 1980 ('1980 Rules') (now repealed and replaced with the Housing Development (Control and Licensing) Rules 2008) to furnish, among others, the letter of guarantee of completion of housing development by directors ('guarantee'). The guarantee was signed by the directors of Yusen Jaya, namely T'en Kuet Fah ('TKF') and the first and second defendants. TKF then resigned whereas the first and second defendants were still the directors of Yusen Jaya. The defendants signed the subsequent letters of guarantee after the resignation of TKF. The plaintiffs were buyers of 46 residential houses in the housing

project and had entered into sale and purchase agreements ('SPA') with Yusen Jaya. There was a delay in the completion of the housing project and upon taking possession of the houses, the plaintiffs discovered that there were structural defects in their houses. They filed complaints warranted under the SPA which Yusen Jaya failed to remedy. As a result, the plaintiffs commenced a suit ('Suit K-79') against Yusen Jaya claiming, *inter alia*, liquidated ascertained damages ('LAD') for late delivery of the houses and damages for breach of contract on the ground that the construction of the houses with they had purchased were seriously defective. The plaintiffs obtained judgment against Yusen Jaya for damages and were awarded RM4,593,372.67 ('judgment sums'). The plaintiffs requested the COH to process the payments for the judgment sums and their entitlement to be indemnified under the guarantee. When the COH failed to pay the judgment sums, the plaintiffs sued the COH and two others ('Suit BKI-32'). However, the plaintiffs and the COH later came to a compromise. In consideration of the COH assigning all rights under the guarantee to the plaintiffs *via* a deed of assignment ('DOA 2015'), to enable the plaintiffs to commence legal action against the guarantors, the plaintiffs undertook to discontinue Suit BK-132. Armed with the DOA 2015 and the guarantee, the plaintiffs failed in this action against the defendants to recover from them the judgments sums. The HCJ held that (i) the DOA 2015 was an absolute assignment within the meaning of s. 4(3) of the Civil Law Act 1956 ('CLA'); (ii) the plaintiffs had given an express notice in writing of the DOA 2015 to the defendants; (iii) the defendants had not agreed to indemnify the plaintiffs for loss which they may have suffered as a result of Yusen Jaya's breaches of the SPA, save to complete the housing project within the stipulated time of completion; and (iv) the plaintiffs had received a sum of RM1,338,728 as partial settlement of the judgment sum awarded in the K-79 Suit. On the balance of probabilities, the HCJ found that the plaintiffs had failed to prove their case against the defendants. Hence, this appeal. The issues that arose were: (i) the validity of the DOA 2015; (ii) the interpretation of the guarantee; and (iii) if the first and second issues favoured the plaintiffs, whether the plaintiffs' claim was barred by limitation.

Held (allowing appeal)

Per Che Mohd Ruzima Ghazali JCA delivering the judgment of the court:

(1) It was undisputed fact that the DOA 2015 was documented in writing and was given under the hand of the COH, the assignor, to the plaintiffs, the assignees. Looking at the provisions under cl. 13 of the DOA 2015, it was crystal clear that the COH had assigned all rights under the guarantee to the plaintiffs to enable them to commence legal action against the defendants. The language used in the DOA 2015 was simple and straightforward. The words 'assigned all rights' used were clear and unambiguous. The court could not infer any other meaning to the word 'all' than its ordinary meaning which was, 'each and every'. It meant

that the COH wanted to assign his entire right to the plaintiffs even though the words 'absolute' was not used. Evidence showed that the solicitors of the plaintiffs did serve the notice of the assignment on both defendants *via* their former solicitors on record who acknowledged receipt. The notices were sufficient to fulfil the third condition required under sub-s. 4(3) of the CLA. The provision did not state who should give the notice of assignment. Therefore, the court could not accede to the defendants' contention that the notice of assignment was defective because notice ought to have been given by the COH instead of the plaintiffs. The DOA 2015 had fulfilled all conditions that were required under sub-s. 4(3) of the CLA to be an absolute assignment. (paras 26-29)

(2) Under s. 79 of the Contracts Act 1950, a 'contract of guarantee' is defined as a contract to perform the promise or discharge the liability of a third person in the event of his default. There must be three parties involved under a contract of guarantee: the surety, the principal debtor and the creditor. Under the guarantee, the defendants were the 'surety', Yusen Jaya was the 'principal debtor or principal person' and the COH was the 'creditor of guaranteed person'. The guarantee given by the defendants to the COH was to ensure the full completion of the housing project within the stipulated time and for the due performance of the several obligations of Yusen Jaya in relation to the completion of the housing project and in the guarantee, the defendants agreed to indemnify the plaintiffs against loss and damage caused to them arising or resulting from Yusen Jaya's failure to complete the project within the stipulated time for completion or its breach of obligations thereto. In short, the COH had a proprietary right or chose in action to act against the defendants and could seek to enforce the right or the chose in action under the guarantee against the defendants. (paras 38 & 40)

(3) The COH merely assigned his right or the chose in action to the plaintiffs to enable them to commence legal action against the defendants under the guarantee. That was all. There was no delegation of power involved. The plaintiffs had legally acquired the chose in action to file an action against the defendants to materialise the judgment sums. (paras 44 & 45)

(4) Looking at the guarantee as a whole, without a doubt, in its plain and ordinary meaning meant that the defendants had jointly and severally agreed to guarantee the due performance of Yusen Jaya. They would ensure the full completion of the housing project until the delivery of the houses to the buyers with the certification of fitness for occupation within the time stipulated as agreed. It did not stop there. The defendants also agreed to jointly and severally indemnify the plaintiffs for any loss or damage caused to them or any of them if Yusen Jaya breached its obligations under the SPA or failed to complete the housing

project within the time frame specified. The HCJ failed to take into consideration the background facts of the contracting parties in his interpretation of the guarantee. The defendants were the directors of a housing developer company. As directors of Yusen Jaya, the defendants should know the purpose of such requirement under the law and should foreknow that the risk that they had to bear if Yusen Jaya fails to deliver the houses in the housing project to the plaintiffs on time or fails to observe its obligations under the SPA. (paras 54 & 57)

(5) The plaintiffs' claim against the defendants was not barred by limitation. The judgment sums awarded to the plaintiffs against Yusen Jaya in Suit K-79 was given on 27 January 2011. Then, the plaintiffs entered into the DOA 2015 with the COH on 10 February 2015 and thereafter, the plaintiffs filed their action in the High Court on 14 September 2015 to enforce the guarantee against the defendants. On those facts, the time started to run against the plaintiffs to take action against the defendants from the date of the DOA 2015, that was, the date when the plaintiffs acquired the right or the chose in action from the COH. (para 60)

Case(s) referred to:

Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals [2020] 1 CLJ 162 FC ***(dist)***

Bank Pembangunan Malaysia Bhd v. Spring Hill Bioventures Sdn Bhd [2020] 4 CLJ 15 CA ***(refd)***

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

Bounty Dynamics Sdn Bhd v. Chow Tat Ming & Ors [2015] 9 CLJ 422 CA ***(refd)***

City Investment Sdn Bhd v. Koperasi Serbaguna CUEPACS Tanggungan Bhd [1987] 1 LNS 62 PC ***(refd)***

City Investment Sdn Bhd v. Koperasi Serbaguna CUEPACS Tanggungan Bhd [1985] 1 CLJ 131; [1985] CLJ (Rep) 77 FC ***(refd)***

Kabushiki Kaisha Ngu v. Leisure Farm Corporation Sdn Bhd & Ors [2016] 8 CLJ 149 FC ***(refd)***

Khau Daw Yau v. Kin Nam Realty Development Sdn Bhd [1982] 1 LNS 81 HC ***(refd)***

Kong Ming Bank Bhd v. Leong Ho Yuen [1982] 1 LNS 23 FC ***(refd)***

Lim Chon Jet & Ors v. Yusen Jaya Sdn Bhd [2011] 8 CLJ 598 HC ***(refd)***

Loh Wai Lian v. S.E.A. Housing Corporation Sdn Bhd [1987] 1 LNS 37 PC ***(refd)***

MBf Insurans Sdn Bhd v. Lembaga Penyatuan Dan Pemulihan Tanah Persekutuan (FELCRA) [2007] 6 CLJ 639 CA ***(refd)***

Mohamed Tawfik Tun Dr Ismail v. HLG Credit Sdn Bhd & Anor [2012] 2 CLJ 65 CA ***(refd)***

Nouvau Mont Dor (M) Sdn. Bhd v. Faber Development Sdn Bhd [1985] 1 CLJ 56; [1985] CLJ (Rep) 231 FC ***(refd)***

Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(dist)***

PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals [2021] 2 CLJ 441 FC ***(refd)***

Public Finance Bhd v. Scotch Leasing Sdn Bhd; Perwira Habib Bank Malaysia (Intervener) [1996] 3 CLJ 635 FC ***(refd)***

S.E.A. Housing Corp Sdn Bhd v. Lee Poh Choo [1982] CLJ 355; [1982] CLJ (Rep) 305 FC ***(refd)***

South East Asia Insurance Bhd v. Nasir Ibrahim [1992] 4 CLJ 1801; [1992] 1 CLJ (Rep) 295 SC ***(refd)***
The Pacific Bank Bhd v. Kerajaan Negeri Sarawak [2015] 3 CLJ 717 FC ***(refd)***
Trendtex Trading Corp v. Credit Suisse [1980] 3 All ER 721 ***(refd)***
UMW Industries (1985) Sdn Bhd v. Ah Fook [1996] 1 CLJ 379 FC ***(refd)***
Yeoman Credit Ltd v. Latter & Anor [1961] 2 All ER 294 ***(refd)***
YM Orang Kaya Menteri Paduka Dato' Wan Ahmad Isa Shukri Wan Rashidi v. Kwong Yik Bank Bhd (2) [1989] 2 CLJ 1288; [1989] 1 CLJ (Rep) 187 SC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 4(3)
Contracts Act 1950, ss. 77, 79
Housing (Control and Licensing of Developers) Rules 1980, r. 3(1), Schedule A
Housing Developers (Control and Licensing) Rules 1970, r. 12
Limitation Ordinance (Sabah) (Cap 72), s. 3, Schedule items 94, 95

For the appellants - Alex Decena & Jordan Kong; M/s Jayasuria Kah & Co
For the respondents - Colin Lau & Kelvin Wong; M/s Baldev Gan & Assocs

[Editor's note: For the High Court judgment, please see Lim Chon Jet & Ors v. Wee Ai Hua & Anor [2020] 1 LNS 979 (overruled).]

Reported by Lina E

JUDGMENT

Che Mohd Ruzima Ghazali JCA:

Introduction

[1] This is an appeal by Lim Chon Jet @ Lim Chon Jat and 45 others (appellants/plaintiffs), who are appealing against the whole decision of the learned High Court Judge (LHCJ) delivered on 14 February 2019. In his decision, the LHCJ dismissed with cost the appellants plaintiffs' action seeking to enforce the statutory guarantee/indemnity against Wee Ai Hua and Wee Kok Hui (respondents/defendants).

[2] For ease of reference, parties in this appeal will be referred to as in the trial court, the plaintiffs and the defendants.

Brief Background Facts

[3] In 2002, a developer company, Yusen Jaya Sdn Bhd (Yusen Jaya) applied to the Controller of Housing (COH) for amongst others, a licence to develop a housing project called Taman Bukit Saujana Springfields Homes located at Jalan Bantayan, Off Jalan Tuaran Mile 31/2, Kota Kinabalu, Sabah (the housing project).

[4] Yusen Jaya was required under the provisions of the Housing Development (Control and Licensing) Enactment 1978 (the 1978 Enactment) and the Housing (Control and Licensing of Developers) Rules

A 1980 (the 1980 Rules) to furnish several documents and standard forms in support of their application. Amongst all these documents which had been furnished by Yusen Jaya to the COH, was the letter of guarantee of completion of housing development by directors dated 11 June 2002 (the guarantee). The 1980 Rules had been repealed and replaced with the B Housing Development (Control and Licensing) Rules 2008.

[5] The guarantee was in the prescribed form, found in Appendix B of Schedule A in the 1980 Rules. The guarantee was signed by the directors of Yusen Jaya, namely, T'en Kuet Fah (TKF), the first and second defendants. Subsequently, the defendants with or without TKF had issued five identical C letters of guarantee upon request from the COH. In 2009, TKF resigned as Yusen Jaya's director. Whereas, the first and second defendants were and still are the directors of Yusen Jaya. The defendants did sign the subsequent letters of guarantee after the resignation of TKF.

D **[6]** The plaintiffs are buyers of 46 residential houses in the housing project. On various dates, the plaintiffs entered into a sale and purchase agreement (SPA) with Yusen Jaya. It was not disputed that there was a delay in completing the housing project by Yusen Jaya.

[7] Upon taking possession of the houses, the plaintiffs discovered that E there were structural defects in their houses. They filed usual complaints warranted under the SPA which Yusen Jaya failed to remedy. As a result, the plaintiffs commenced a suit No. K22-79-2006-I (Suit K-79) against Yusen Jaya claiming *inter alia*, liquidated ascertained damages (LAD) for late delivery of the houses and damages for breach of contract on the ground that the construction of the houses which they had purchased were seriously F defective.

[8] The plaintiffs' claim for LAD was based on the number of days of delay calculated from the date of the SPA until the date of the issuance of the occupation certificates (OC). The delays ranged from 47 days to 246 days as can be seen in the reported case at p. 606 of *Lim Chon Jet & Ors v. Yusen* G *Jaya Sdn Bhd* [2011] 8 CLJ 598.

[9] The plaintiffs obtained judgment against Yusen Jaya for damages in failing to construct the houses in accordance with the SPA which included LAD for late delivery of the houses. The total damages awarded against H Yusen Jaya in Suit K-79 was RM4,593,372.67 (judgment sums).

[10] The plaintiffs' solicitors had by their letter dated 24 February 2011 requested the COH to process payment for the plaintiffs' judgment sums and their entitlement to be indemnified under the guarantee. When the COH failed to pay the plaintiffs the judgment sums, the plaintiffs sued the COH and I two others in Suit BKI-22NCvC-32-12-2013 (Suit BKI-32). However, sometimes in February 2015, the plaintiffs and the COH came to a compromise. In consideration of the COH assigning all rights under the

guarantee to the plaintiffs *via* a deed of assignment dated 10 February 2015 (DOA 2015) to enable the plaintiffs to commence legal action against the guarantors, the plaintiffs undertook to discontinue Suit BK-132 against the COH and two others.

[11] Armed with the DOA 2015 and the guarantee, the plaintiffs failed in this action against the defendants to recover from them the K-79 judgment sums. The defendants denied liability and defended against the plaintiffs' claim.

High Court's Decision

[12] The LHCJ was of the view that there were three issues to be decided and those three issues are as follows:

(i) whether the DOA 2015 is an absolute assignment in writing within the meaning of s. 4(3) of the Civil Law Act 1956;

(ii) if the answer is yes, then upon express notice in writing being given to the defendants, the DOA 2015 shall be deemed to have been effectual in law, and the plaintiffs shall be entitled to bring this action against the defendants in their own names, without joining the assignor, namely the COH as a party to this action; and

(iii) what is the scope of the defendants' obligations under the terms of the guarantee?

[13] The LHCJ dealt with the first and second issue together. Guided by the principles set out by the Federal Court in *Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* [1985] 1 CLJ 56; [1985] CLJ (Rep) 231; [1984] 2 MLJ 268 and upon reading the DOA 2015 as a whole, the LHCJ found that the DOA 2015 is an absolute assignment within the meaning of s. 4(3) of the Civil Law Act, 1956 (CLA 1956). The LHCJ also found that the plaintiffs had by letters dated 14 May 2015 given an express notice in writing of the DOA 2015 to the defendants. Following the Court of Appeal decision in *Mohamed Tawfik Tun Dr Ismail v. HLG Credit Sdn Bhd & Anor* [2012] 2 CLJ 65; [2012] 2 MLJ 626 the LHCJ held that the notice of need not be a formal notice. As long as information relating to the DOA 2015 was conveyed to the defendants, they had notice of the assignment.

[14] As to the third issue, the LHCJ found that the guarantee given by the defendants to the COH was to ensure the full completion of the housing project within the stipulated time for completion, and for the due performance of the several obligations of Yusen Jaya in relation to the completion of the housing project. In Suit K-79, the plaintiffs chose to uphold the sale and purchase agreements, accept the completion of the houses, and sue for LAD and damages for defective works. In such a case, the damages awarded in Suit K-79 was not for Yusen Jaya's failure to complete the

housing project, except that a small part of the judgment sums, namely the sum of RM305,681.67 which was awarded for LAD, for failure to complete the houses within the stipulated period of completion. The defendants had not agreed to indemnify the plaintiffs for losses which they may have suffered as a result of Yusen Jaya's breaches of the SPA, save to complete the housing project within the stipulated time of completion. The LHCJ recognised that the plaintiffs had received a sum of RM1,338,728 as partial settlement of the judgment sum awarded in the K-79 Suit. This sum for partial settlement had exceeded the LAD awarded in Suit K-79, which is RM305,681.67. On a balance of probabilities, the LHCJ found that the plaintiffs had failed to prove their case against the defendants and dismissed the claim with costs of RM25,000 to the defendants.

The Appeal

[15] In the amended memorandum of appeal, the plaintiffs' appeal was based on the ground that the LHCJ erred in law and in facts when His Lordship misconstrued the scope of the defendants' contractual obligations as guarantors and indemnitors under the guarantee. In summary, counsel for the plaintiffs' submission before us are as follows:

(i) the LHCJ was right in holding that the DOA 2015 satisfies the three conditions stated in s. 4(3) of the Civil Law Act 1956;

(ii) the law of maintenance and champerty does not apply to the facts and circumstances of the plaintiffs' claim. Instead, the law of maintenance and champerty is to "protect the purity of justice and the interests of vulnerable litigants";

(iii) the guarantee can be assigned. It is not an assignment of a bare right to action or to litigate because the plaintiffs have a genuine commercial interest in taking the assignment and enforcing it for their own benefit;

(iv) the 1978 Enactment and the 1980 Rules do not prohibit assignment. In the absence of a validity period clause, the guarantee is not limited in time. Therefore, the guarantee is valid and subsisting;

(v) the guarantee ought to be interpreted liberally and in accordance with the purposive rule. The LHCJ had failed to apply the purposive rule, and as a result, the LHCJ failed to consider the purpose of the social legislation and the Legislature's intention to mitigate the unequal bargaining power between home buyers and housing developers;

(vi) the guarantee indemnifies the purchasers of all losses suffered from any breach of obligation committed by the Yusen Jaya under the SPAs. The LHCJ interpreted the guarantee illogically because the interpretation preferred by the LHCJ does not make business sense;

(vii) the LHCJ erred when His Lordship failed to recognise that the guarantee is an exception to the principle of a separate legal entity. Where legislation requires a personal guarantee of a director to be given for and on behalf of its company, the Legislature must have intended for the separate legal entity principle to be disregarded;

(viii) the LHCJ erred when he applied the *contra proferentum* rule in interpreting the guarantee when there is no ambiguity in the terms of the guarantee and the terms of the guarantee are standard terms enacted by legislation to protect house buyers from unscrupulous developers;

(ix) the LHCJ erred when he noted that the plaintiffs were entitled to claim the return of the purchase price due to a total failure of consideration; and

(x) the plaintiffs filed their action against the defendants within time.

[16] Counsel for defendants submitted that the LHCJ made no error in law or in facts that warrant appellate intervention. In construing the guarantee as a whole, the LHCJ was right in dismissing the plaintiffs' claim against the defendants for the judgment sums in Suit K-79. His Lordship did not make any mistake in finding that the defendants had not agreed to indemnify the plaintiffs for the losses which they had suffered as a result of Yusen Jaya's breaches of the SPA save to complete the housing project within the stipulated time of completion. Counsel for the defendants further submit that the LHCJ ought also to have dismissed the plaintiffs' claim in this action on the following grounds:

(i) the plaintiffs' own pleaded case was that by the guarantee the defendants agreed to jointly and severally indemnify the COH against all loss or damage caused to the plaintiffs or any of them arising or resulting from any breach of obligations by Yusen Jaya, or their failure to complete the housing project within the agreed time for completion. However, the words in cl. 2 of the guarantee, in their plain, ordinary, and popular meaning, indicate that it was intended to indemnify the COH rather than the plaintiffs;

(ii) clause 2 of the guarantee is not an indemnity as defined under s. 77 of the Contracts Act 1950 (CA 1950) neither a guarantee as defined under s. 79 of the CA 1950. It envisages at least a further step was needed to be taken, that is, for the directors of Yusen Jaya to enter into a guarantee or indemnity with the purchasers to guarantee or indemnify them of their losses. Clause 2 at best is akin to an agreement to agree;

(iii) at the trial, there was no evidence led to prove that the COH had suffered any damages or losses, nor had the COH demanded or sought or informed the defendants of any such damages or losses. In the circumstances of this case, the COH had no responsibility to the plaintiffs;

(iv) the assignees cannot be in a better position than the assignor. An assignee cannot recover more from the debtor than the assignor could have done had there been no assignment. Therefore, as the COH suffered no loss or damage nor was he even in law liable to the plaintiffs, the plaintiffs' claim for damage or loss is without any legal basis;

(v) suit K-79 judgment sums is not binding on the defendants as they were not parties to that suit;

(vi) the COH has no power to assign the guarantee to the plaintiffs to enable them to commence the action under the 1978 Enactment. The COH could not assign his statutory duty or right to the plaintiffs. This is also akin to a delegation of a power to do a statutory act;

(vii) the DOA 2015 would have an effect of splitting the obligations of Yusen Jaya under the 1978 Enactment and the defendants as guarantors under the guarantee to the COH and hence, making the assignment impossible and void;

(viii) the DOA 2015 was solely to enable the plaintiffs to commence action against the defendants under the guarantee when the COH had refused to take action against the defendants under the said guarantee and therefore amount to or had the effect of an assignment of a bare right of action which is invalid under the law;

(ix) the DOA 2015 was not an absolute assignment and therefore this action could not be commenced in the sole name of the plaintiffs. The LHCJ erred in law and in fact when he held that the assignment was an absolute assignment;

(x) the DOA 2015 purportedly assigned the guarantee but by then the said guarantee had already expired, lapsed, determined or replaced by fresh letters of guarantee, identical in form and substance, signed by the defendants without TKF who had resigned as a director in 2019. As a result, by 2019, the guarantee was no longer effective or enforceable; and

(xi) in any circumstances, the plaintiffs' claim was barred by s. 3 of the Sabah Limitation Ordinance (SLO).

Our Findings

[17] The background facts leading to the plaintiffs' claim against the defendants are not disputed. The plaintiffs' claim against the defendants is emanated from the judgment sums awarded by the High Court in Suit K-79. In that suit, the plaintiffs successfully made up their claim against Yusen Jaya and the defendants were not parties to it. The plaintiffs' cause of action against the defendants is based on the guarantee issued by the defendants to the COH and the DOA 2015 issued by the COH to the plaintiffs. The existence of the two contemporaneous documents is also not disputed.

[18] After having construed the submission of both parties, we summarised that the plaintiffs' appeal and the defendants' opposition to the appeal stem on three broad issues. First, the validity of the DOA 2015, second, the interpretation of the guarantee and third, if the first and the second issues favour the plaintiffs, whether the plaintiffs' claim is barred by limitation.

The Validity Of The DOA 2015

[19] To recap, evidence shows that Yusen Jaya applied to the COH for a housing developer licence to develop the housing project, a requirement under the 1978 Enactment in June 2002. Amongst other documents required by the COH to process and approve the licence for the housing project and later the advertisement and sale permit was the guarantee. It was on a statutory form of the COH under Part II of the 1978 Enactment and under r. 3(1) of the 1980 Rules and had to be executed by all directors of Yusen Jaya including the defendants.

[20] The plaintiffs bought their houses from Yusen Jaya in the housing project and were given vacant possession of their houses in 2005. The local authority had issued the occupation certificates for all the houses in the housing project in July and October 2005. Dissatisfied with the late delivery of some of the houses and some major defects in some of the houses, the plaintiffs commenced Suit K-79 against Yusen Jaya for damages and losses in 2006. The plaintiffs succeeded in their claim at the High Court and Yusen Jaya's appeal to the Court of Appeal was dismissed.

[21] Then, the plaintiffs notified and claimed for indemnity against the COH to materialise the judgment sums given in Suit K-79. After being ignored, the plaintiffs filed Suit BKI-32 against GOH in 2013. In February 2015, the COH and the plaintiffs entered into the DOA 2015 to enable the plaintiffs to commence legal action against the defendants and TKF.

[22] Let us now look at the DOA 2015. For better understanding, it would be appropriate for us to reproduce the entire terms and conditions of the DOA 2015 which are as follows:

A

DEED OF ASSIGNMENT

THIS ASSIGNMENT is made the ... day of 10 FEB 2015.

BETWEEN

The Controller of Housing, under the Housing Control Unit of the
B Ministry of Local Government and Housing Sabah of 4th Floor, Block C, Wisma Tun Fuad Stephens, 88999 Kota Kinabalu (hereinafter referred to as the Assignor).

AND

The 46 persons whose names are set out in **Annexure – 1** attached to this
C Deed of Assignment (hereinafter collectively referred to as the Assignees). Yong Sai Khuing has been authorised by the Assignees to enter into this Deed of Assignment on their behalves.

WHEREAS:

1. The Assignees are the purchasers of various properties in a housing
D scheme known as Taman Bukit Saujana Springfield Hsomes comprising of one hundred and two (102) units of residential houses of various types and designs, situated at Jalan Bantayan, Off Jalan Tuaran Mile 31/2, Kata Kinabalu, Sabah ("the Project").

2. Yusen Jaya Sdn Bhd (10047-W) is the Developer of the Project
E ("Yusen Jaya").

3. By Sale and Purchase Agreements entered into between the Assignees and Yusen Jaya, and another party ("the Agreements"), Yusen Jaya agreed to sell and the Assignees agreed to purchase the houses subject to the terms under the Agreements, and subject to the plans, drawings
F and specifications annexed to the Agreements.

4. In suit K22-79 of2006 (K79), the Assignees sued Yusen Jaya claiming damages and loss for, among other things, delivering defective houses and delivering late possession of the houses to the Assignees.

5. After a full trial, the High Court on 27 January 2011 gave the following
G judgment in K79 to the Assignees:

1. The judgment sums of RM4,592,372.67;

2. Interest on the judgment sum of RM4,592,372.67 at the rate of 8% per annum from 27th January 2011 until the full settlement of the Judgment sum; and

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3. Cost to be taxed unless agreed.

6. Yusen Jaya appealed the Judgment of the High Court on 27 January 2011. The Court of Appeal heard and dismissed the appeal on 11 December 2012.

I 7. Accordingly, by letter dated 24 February 2011 the Assignees' solicitors wrote to the Assignor informing the Assignor that the Assignees had obtained judgment against Yusen Jaya in the High Court for, among other things, RM4,592,372.67.

8. The Assignor was required to and had obtained the Letter of Guarantee dated 11 June 2002 from the Directors of Yusen Jaya, in accordance with s. 5(1)(a), (3), (4) of the Housing Development (Control and Licensing) Enactment 1978, read together with Schedule A and Appendix B of the Housing Development (Control and Licensing) Rules 2008. The Directors of Yusen Jaya are T'en Kuet Fah, Wee Kok Hui and Wee Ai Hua. The Letter of Guarantee dated 11 June 2002 is marked as **Annexure – 2** attached to this Deed of Assignment.

9. In the 24 February 2011 letter, the Assignees' solicitors referred to a Letter of Guarantee dated 11 June 2002 given to the Assignor by Yusen Jaya three Directors T'en Kuet Fah, Wee Kok Flui and Wee Ai Hua. Under the Letter of Guarantee, the three Directors agreed to jointly and severally indemnify the Assignees against all loss or damages caused to them or any of them arising or resulting from any breach of obligations by Yusen Jaya, or failure to complete the housing development within the agreed time for completion.

10. The Assignees solicitors' letter dated 24 February 2011 had requested the Assignor to process payment for the Assignees' judgment sum of RM4,592,372.67, and their entitlement to be indemnified for that sum under the Letter of Guarantee given by the three Directors of Yusen Jaya.

11. The Assignor has refused to pay to the Assignees the judgment sums of RM4,592,372.67, and has not taken any action to enforce the three Directors' obligations to indemnify the Assignees in accordance with the terms of the Letter of Guarantee dated 11 June 2002.

12. The Assignees then sued the Assignor & 2 others in Suit No. BKI-22NCvC-32/12-2013. The Defendants in that Suit have filed their Defence. The Suit will be called for mention on 11 February 2015.

NOW THIS DEED WITNESSETH as follows:

13. The Assignor has assigned all rights under the Letter of Guarantee dated 11 June 2002 to the Assignees to enable them to commence legal action against T'en Kuet Fah, Wee Kolc Hui and Wee Ai Hua the three Directors of Yusen Jaya Sdn Bhd.

14. For and in consideration of this Deed of Assignment the Assignees undertake to discontinue Suit No. BKI-22NCvC-32/12-2013 against the Assignor and the 2nd and 3rd Defendants upon execution of this Deed of Assignment.

[The rest of this page is intentionally left blank]

IN WITNESS WHEREOF the parties have hereunto set our hands and seal the day and year first above written.

SIGNED by the Controller of Housing
the Assignor

In the Presence of:

t.t Seal	t.t Seal
_____	_____
MOHD FAIZAL IZUDDIN B MOHD HANAN Pegawai Undang-Undang Gred L1	DATUK MATIUS SATOR Setiausaha Tetap Kem. Kerajaan Tempatan & Perumahan

SIGNED by Yong Sai Khuing
for and behalf of the Assignees
In presence of

t.t Seal	t.t
_____	_____
Eric @ Patrick Sikodol Commissioner for oaths	Yong Sai Khuing

[23] In answering the issue on whether the DOA 2015 is an absolute assignment in writing within the meaning of s. 4(3) of the CLA 1956, the LHCJ referred to the Federal Court decision in *Nouvau Mont Dor (M) Sdn. Bhd v. Faber Development Sdn Bhd* [1985] 1 CLJ 56; [1985] CLJ (Rep) 231; [1984] 2 MLJ 268 and made the following finding:

> [16] Reading the DOA as a whole, I find that it is an absolute assignment within the meaning of s. 4(3) of the Civil Law Act, 1956. I also find that the plaintiffs had by letters dated 14 May 2015 given an express notice in writing of the assignment to the defendants. Such notice of assignment need not be a formal notice, or be given by the Housing Controller specifically, as long as information relating to the DOA was conveyed to the defendants so that they had notice of the assignment (see *Mohamed Tawfik bin Tun Dr Ismail v. HLG Credit Sdn Bhd & Another* [2012] 2 MLJ 626).
>
> [17] In the premises, I find that the DOA has complied with the requirements of s. 4(3) of the Civil Law Act, 1956, and it shall be deemed to have been effectual in law to pass and transfer the legal chose in action to the plaintiffs. The plaintiffs are entitled to bring this action against the defendants in their own names, without joining the Housing Controller as a party. ...

[24] The plaintiffs concur with the LHCJ finding on the said issue. The defendants disagree. Counsel for the defendants submitted before us that in defending the judgment, they will regurgitate the defendants' points of defence that the learned judge erred in finding that the DOA 2015 was an absolute assignment and that the COH therefore need not be named as a party. However, the defendants failed to file any appeal to vary or set aside the LHCJ substantive finding on the said issue. We are of the opinion that the defendants' failure to file a notice of appeal will disable them from mounting any challenge on the LHCJ's finding on the said issue. We find

support in the Federal Court's decision in the case of *Kabushiki Kaisha Ngu v. Leisure Farm Corporation Sdn Bhd & Ors* [2016] 8 CLJ 149; [2016] 5 MLJ 55. Federal Court held that:

> [16] We also agree with the Court of Appeal's finding that it had considered the clear provisions under r. 5 of the RCA 1994, and holding that r. 5 of the RCA 1994 provided for an appeal to be lodged against the whole or part of any judgment or order of court, and such an appeal in contrast to a cross-appeal is by way of a re-hearing. *The word 're-hearing' used clearly anticipated a review or regurgitation before the appeal court of all the points and arguments taken at the court below. Hence, if it was the substantive finding of the court that was intended to be attacked, it behoved upon the party aggrieved to file a proper notice of appeal.*
>
> [17] We noted that the Court of Appeal's decision on the issues raised in the present appeal has been recently followed by another panel of the Court of Appeal in the case of *Pengerusi Suruhanjaya Pilihanraya Malaysia (Election Commission of Malaysia) v. See Chee How & Anor* [2015] 8 CLJ 367; [2016] 3 MLJ 365 wherein Abdul Rahman Sebli JCA had this to say:
>
> > [81] In the appeal before us, the High Court's refusal to grant prayers (a) and (b) of the application is a decision that is adverse to the respondents and appealable at their instance. The respondents should have filed a separate notice of appeal if they wanted the decision to be reversed or set aside and not by filing a cross-appeal as was done in this case.
>
> [18] *It is our considered view that since the High Court found that a valid and binding agreement was concluded between the plaintiff and the first defendant and such a finding being adverse against the first defendant, the first defendant should have filed a separate notice of appeal ie if the first defendant wanted the aforesaid decision to be reversed or set aside.*
>
> [19] Useful reference can also be made to the provision of s. 67(1) of the Courts of Judicature Act 1964 ('the CJA 1964') which provides as follows:
>
> > 67 Jurisdiction to hear and determine civil appeals
> >
> > (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought.
>
> [20] *We are of the view that s 67(1) of the CJA 1964 clearly provides that a litigant has the right of appeal to appeal against 'any judgment or order of any High Court'. It is therefore trite that such an appeal must be filed pursuant to r. 5 of the RCA 1994.*
>
> (emphasis added)

[25] Even if, the defendants had filed a notice of appeal to challenge the LHCJ finding on the issue, we still find that there is no appealable error in the LHCJ's finding on the said issue. Federal Court in the case of *UMW Industries (1985) Sdn Bhd v. Ah Fook* [1996] 1 CLJ 379 laid down the following conditions for effecting absolute legal assignments:

(1) that the assignment must be in writing under the hand of the assignor;

(2) that the assignment must be absolute and not by way of charge only; and

(3) that express notice in writing must have been given to the person liable to the assignor under the assigned chose in action.

Federal Court further held that:

> If the assignment fulfils all the above conditions, it would transfer absolutely the chose in action and the right to sue upon it in the assignee's own name.
>
> As to the assignment in writing, no particular form is necessary but it must be absolute *ie*, one that purports to pass the entire interest of the assignor in the chose in action. Thus, in *Curran v. Newpark Cinemas Ltd.* [1951] 1 All ER 295 CA Jenkins LJ dealing with s. 136(1) of the Law of Property Act 1925 (English) the equivalent of which in our law is s. 4(3) of the Civil Law Act 1956, said: (Page 299 F-H)
>
> > It is, no doubt, true that s. 136(1) does not require, any particular form of assignment, or that the notice given to the debtor should necessarily have been given by the assignee. The sub-section does, however, clearly postulate that, whatever its form, there should be a document amounting to an absolute assignment by writing under the hand of the assignor. Given such an assignment, and given the requisite notice to the debtor, the assignment (to put it shortly) is to operate as a legal assignment of the debt in question.

[26] Back to the issue of whether DOA 2015 is an absolute assignment under sub-s. 4(3) CLA 1956, firstly, it is undisputed fact that the DOA 2015 was documented in writing and was given under the hand of the COH, the assignor to the plaintiffs, the assignees.

[27] Secondly, looking at the provision under cl. 13 of the DOA 2015, it is crystal clear that COH has assigned all rights under the guarantee to the plaintiffs to enable them to commence legal action against the defendants, the directors of Yusen Jaya. The language used in the DOA 2015 is simple and straightforward. The words 'assigned all rights' used are clear and unambiguous. So, we are of the view that we could not infer any other meaning to the word 'all' than its ordinary meaning that is, 'each and every' as submitted by the counsel for the plaintiffs in his written submission. Its means that, the COH wanted to assign his entire right to the plaintiffs even though the words 'absolute' was not used.

[28] Thirdly, as to the notice in writing that must have been given to the person liable to the assignor under the assigned chose in action, evidence shows that solicitors for the plaintiffs did serve the notice of the assignment on both defendants *via* their former solicitors on record who acknowledged receipt. We are of the opinion that the notices are sufficient to fulfil the third condition required under sub-s. 4(3) of the CLA 1956. The said provision does not state who should give the notice of assignment. Therefore, we cannot accede to the counsel for the defendants' contention that the notice of assignment is defective because notice ought to have been given by the COH, instead of the plaintiffs.

[29] In light of what has been stated above, we are of the same opinion with the LHCJ and counsel for the plaintiffs' contention that the DOA 2015 had fulfilled all conditions that are required under sub-s. 4(3) of the CLA 1956 to be an absolute assignment.

[30] Furthermore, we also agree with the counsel for the plaintiffs' alternative argument that even if the DOA 2015 does not comply with sub-s. 4(3) CLA 1956, the plaintiffs may exercise their rights as equitable assignees. Federal Court in the case of *Public Finance Bhd v. Scotch Leasing Sdn Bhd; Perwira Habib Bank Malaysia (Intervener)* [1996] 3 CLJ 635 held at p. 649 that:

> At common law, (in the special sense now of its being distinguished from rules in equity), contractual rights, *eg*, as to debts were not assignable, *ie*, transferable to another person without the consent of both parties to the contract conferring such contractual rights. *Equity stepped in and has long allowed such assignment of such debts to another person who is not privy to the contract in respect of such debts, without at all the consent of the debtor, see eg, Brice v. Bannister [1878] 3 QB 569 and even without notice to the debtor, see Kelly v. Selwyn [19051 2 Ch 117, and Ward v. Duncombe [1893] AC 369. Such assignments as so allowed bv equity are called equitable assignments.*
>
> The validity of such equitable assignments is not affected by any failure to comply with requirements as laid down in s. 4(3) of the Civil Law Act 1956 for an assignment that so complies has been described as a statutory assignment; being so statutory for such an assignment has the sole intended effect of facilitating an assignee to sue in his own name directly irrespective of whether the chose in action is an equitable chose in action or a legal chose in action, (not, be it noted, whether an assignment is equitable or statutory). By being a statutory assignment itself, the "statutoriness" of such an assignment, *ipso facto*, does not prevail over an earlier equitable assignment, and this is so even with the added factor that the assignee involved in a statutory assignment took the assignment for value without notice of an earlier equitable assignment, *eg*, see *Pfeifer v. Arbuthnot* [1988] 1 WLR 150.
>
> (emphasis added)

[31] As to the effectiveness of the DOA 2015, counsel for the defendants forwarded at least five arguments before us. In gist, firstly, counsel for the defendants argued that the wordings in cl. 2 of the guarantee in their plain, ordinary and popular meaning mean that it was to indemnify the COH and not the plaintiffs and therefore, the plaintiffs claim is inconsistent with their own pleaded case. Secondly, cl. 2 of the guarantee is not an indemnity as defined under the law and at best is akin to an agreement to agree. Thirdly, there was no evidence to prove that the COH had suffered any damage or loss, nor had the COH demanded or informed the defendants of any such damage or loss. Fourthly, the assignees cannot be in a better position than the assignor and therefore, as the COH suffered no loss or damage, the plaintiffs' claim for damage or loss is without any legal basis. Fifthly, counsel for the defendants harping heavily upon the argument that the COH cannot assign his statutory duty to the plaintiffs.

[32] To deal with the issues of the effectiveness of the DOA 2015 as argued by counsel for the defendants, we will consider all five arguments together since they are interrelated. As to the first and second arguments, part of it relates to the issue of the interpretation of the cl. 2 of the DOA 2015 which we will address later.

[33] Before going into the merits of the arguments forwarded by counsel for the defendants, it is appropriate for us to first look at the purpose of the law being enacted related to housing development. The 1978 Enactment which is in *pari materia* with the Housing Development (Control and Licensing) Act 1966 (Act 118) is designed to regulate the housing development industry and more importantly to protect the interests of house buyers. Quite clearly, Act 118 or in our case the 1978 Enactment is a piece of social legislation enacted to protect house buyers from housing developers. Suffian LP in the Federal Court case of *S.E.A. Housing Corp Sdn Bhd v. Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305; [1982] 2 MLJ 31 at at p. 311 (CLJ); p. 34 (MLJ) when explained why certain paragraphs in r. 12 made under Act 118 could not be allowed to be circumvented had said that:

> It is common knowledge that in recent years, especially when government started giving housing loans making it possible for public servants to borrow money at 4% interest Per annum to buy houses, there was an upsurge in demand for housing, and that to protect home buyers, most of whom are people of modest means, from rich and powerful developers, Parliament found it necessary to regulate the sale of houses and protect buyers by enacting the Act.

Then, VC George J (as he then was) in *Khau Daw Yau v. Kin Nam Realty Development Sdn Bhd* [1982] 1 LNS 81; [1983] 1 MLJ 335 at p. 341 held that:

> The scheme of the Housing Developers (Control and Licensing) Act 1966 and of the Rules of 1970 is to provide a measure of protection to purchasers of housing accommodation in a housing development against unscrupulous developers.

The purpose of the Act 118 is to protect house buyers was again observed by Mohd Azmi FJ (as he then was) in *City Investment Sdn Bhd v. Koperasi Serbaguna CUEPACS Tanggungan Bhd* [1985] 1 CLJ 131; [1985] CLJ (Rep) 77; [1985] 1 MLJ 285. At p. 84 (CLJ); p. 290 (MLJ) His Lordship held that:

> ... The attempt of the appellants to contract out of the Act is clearly not a device which can be described as legitimate. It is an open defiance of the Housing Developers legislation. Having regard to the policy and objective of Housing Developers Act 1966 and the 1970 Rules made thereunder the protection afforded by this legislation to house buyers is not merely a private right but a matter of public interest which Parliament has intended to protect from being bargained away or renounced in advance by an individual purchaser (see the principle enunciated by the House of Lords in *Johnson v. Moreton* [1978] 3 All ER 37, 56 and applied by this court in *SEA Housing Corporation v. Lee Poh Choo* [1982] 2 MLJ 31. ...

Then, Lord Templeman had this to say when the case went on appeal to the Privy Council as can be seen in *City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1987] 1 LNS 62; [1988] 1 MLJ 69 at p. 71:

> It is not surprising that the co-operative society rejected a draft building contract which appeared to flout the terms of the Act of 1966 and was inconsistent with the express provisions of the first contract. The appellants argue that the Act of 1966 does not apply where land is sold and is then developed. This argument makes nonsense of an Act which is clearly designed to protect purchasers from developers, and those purchasers need protection whether the sites of houses are sold before or contemporaneously with or after completion of the houses.

Recently, in a strongly worded 'introduction' in the case of *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* [2021] 2 CLJ 441; [2021] 2 MLJ 60 at p. 454 (CLJ); p. 70 (MLJ), Federal Court observed that:

> [1] The phrase 'social legislation' attached to the Housing Development (Control and Licensing) Act 1966 ('the HDA 1966') and its ensuing subsidiary legislation *ie*, the Housing Development (Control and Licensing) Regulations 1989 ('the HDR 1989') is not merely a fanciful label. In disputes between home buyers and housing developers, its significance lies in the approach taken by the courts to tip the scales of justice in favour of the home buyers given the disparity in bargaining power between them and the housing developers.

[34] Bearing those principles in mind, we will deal with the merits of the counsel for the defendants' arguments. To begin with, it is not disputed that the guarantee was given by the defendants to the COH and not to the plaintiffs. On this issue, we have to look at the purpose of having the guarantee. As required under the 1978 Enactment and 1980 Rules, the COH

had asked the defendants to execute the guarantee as part of the processes to get the licence for the housing project and the advertisement and sale permit for the housing project approved.

[35] Under the guarantee, the defendants agreed to jointly and severally guarantee the due and performance of the housing project by Yusen Jaya. The defendants further agreed to indemnify the plaintiffs of all loss or damage caused to them arising from any breached of obligations by Yusen Jaya. Without the guarantee, the COH had the discretion not to approve the licence to allow the development of the housing project by Yusen Jaya. After the licence had been issued by the COH and upon Yusen Jaya's failure to observe its obligations in the housing project, surely there is a right or chose in action for the COH to make a claim to enforce the guarantee against the defendants on behalf of the plaintiffs. If not, it renders that the guarantee issued by the defendants to the COH meaningless.

[36] As a regulator or a custodian of the 1978 Enactment, the COH is well equipped with the power to ensure that the plaintiffs rights are protected. We cannot agree with counsel for the defendants' contention that the guarantee was only to indemnify the COH and not the plaintiffs. In the contrast, we agree with the counsel for the plaintiffs' submission that the guarantee is not an assignment of a bare right to action or to litigate because the plaintiffs have a genuine and legitimate interest in taking over the assignment. The plaintiffs are legitimately exercising their legal right to enforce the judgment sums which was awarded by the High Court against Yusen Jaya in Suit K-79. On this point, we find support in the illustration and the decision of the House of Lords in *Trendtex Trading Corp v. Credit Suisse* [1980] 3 All ER 721 as per Lord Roskill held that:

> My Lords, just as the law became more liberal in its approach to what was lawful maintenance, so it became more liberal in its approach to the circumstances in which it would recognise the validity of an assignment of a cause of action and not strike down such an assignment as one only of a bare cause of action. *Where the assignee has by the assignment acquired a property right and the cause of action was incidental to that right, the assignment was held effective. Ellis v. Torrington H92011 K.B. 399 is an example of such a case. Scrutton L.J. stated, at pp. 412-413, that the assignee was not guilty of maintenance or champerty by reason of the assignment he took because he was buying not in order to obtain a cause of action but in order to protect the property which he had bought. But, my Lords, as I read the cases it was not necessary for the assignee always to show a property right to support his assignment. He could take an assignment to support and enlarge that which he had already acquired* as, for example, an underwriter by subrogation: see *Compania Colombiana de Seguros v. Pacific Steam Navigation Co.* [1965] 1 Q.B. 101. My Lords, I am afraid that, with respect, I cannot agree with the learned Master of the Rolls [1980] Q.B. 629, 657 when he said in the instant case that "The old saying that you cannot assign a 'bare right to litigate' is gone." I venture to think that that still remains a fundamental principle of our law. *But it*

is today true to say that in English law an assignee who can show that he has a genuine commercial interest in the enforcement of the claim of another and to that extent takes an assignment of that claim to himself is entitled to enforce that assignment unless by the terms of that assignment he falls foul of our law of champerty, which, as has often been said, is a branch of our law of maintenance. For my part I can see no reason in English law why Credit Suisse should not have taken an assignment to themselves of Trendtex's claim against C.B.N. for the purpose of recouping themselves for their own substantial losses arising out of C.B.N.'s repudiation of the letter of credit upon which Credit Suisse were relying to refinance their financing of the purchases by Trendtex of this cement from their German suppliers. My Lords, I do not therefore think that My Brodie is correct in criticising the judgment of Oliver L.J. on the ground that the learned Lord Justice failed to distinguish between the interest necessary to support an assignment of a cause of action and the interest which would justify the maintenance of an action by a third party. I think, with respect, that this submission involves over-analysis of the position. *The court should look at the totality of the transaction. If the assignment is of a property right or interest and the cause of action is ancillary to that right or interest or if the assignee had a genuine commercial interest in taking the assignment and in enforcing it for his own benefit. I see no reason why the assignment should be struck down as an assignment of a bare cause of action or as savouring of maintenance.*

(emphasis added)

[37] Coming back to the appeal before us, it is an undisputed fact that the plaintiffs succeeded in their claim against Yusen Jaya in Suit K-79. The plaintiffs' claim is a result of Yusen Jaya's failure to observe its obligation under the SPA entered into with the plaintiffs. The defendants consciously agreed to give the guarantee to the COH to indemnify the plaintiffs from Yusen Jaya's failure. Based on that backdrop, we are of the considered view that the COH in his capacity as a regulator under the 1978 Enactment has the necessary residual power to pursue the chose in action to recover losses and damages suffered by the plaintiffs even though the COH had suffered no loss or damage.

[38] Furthermore, it is now settled law that guarantees are not to be construed any different way from any other contract. Federal Court in the case of *Kong Ming Bank Bhd v. Leong Ho Yuen* [1982] 1 LNS 23; [1982] 2 MLJ 111 succinctly made the following observation:

We shall deal first with the contention on behalf of the respondent that as he is merely the guarantor for the Company, the court in construing a contract of guarantee should give it a lighter construction. Reference is made to *Oriental Bank of Malaya Ltd v. N Subramanian* [1958] MLJ 35, 38 where Whyatt C.J. (Singapore) relying on a statement by Fry J. in *Lloyd's v. Harper* 16 Ch D 290 said:

A guarantee, like every other contract, must be construed reasonably; it must be construed by the words used but also with regard to the surrounding circumstances.

This statement does not bear out the proposition that a contract of guarantee is to be construed favourably to the guarantor. It is now settled law that guarantees are not to be construed in any different way from any other contract. See *Esheby v. Federated European Bank Ltd* [1932] 1 KB 254, *Nicholson v. Paget* (1832) 1 C & M 48; 2 LJ (Ex) 18; 149 ER 309 and *Blest v. Brown* (1862) 4 De GF & J 367 376 45 ER 1225.

[39] Under s. 79 of the Contracts Act 1950 (CA 1950), a 'contract of guarantee' is defined as a contract to perform the promise or discharge the liability of a third person in the event of his default. The person who gives the guarantee is called the 'surety', the person in respect of which default the guarantee is given is called the 'principal debtor' and the person to whom the guarantee is given is called the 'creditor'. Therefore, there must be three parties involved under a contract of guarantee: the surety, the principal debtor and the creditor. It is an undertaking to guarantee the obligations of a named principal. A contract of guarantee is essentially a collateral contract by which a guarantor undertakes to answer for the default of the principal debtor to the creditor. As regards to the liability, the guarantor only owes a secondary obligation to the creditor to make good the particular defaults of the principal debtor. See the cases of *Yeoman Credit Ltd v. Latter & Anor* [1961] 2 All ER 294, *South East Asia Insurance Bhd v. Nasir Ibrahim* [1992] 4 CLJ 1801; [1992] 1 CLJ (Rep) 295 and *Bank Pembangunan Malaysia Bhd v. Spring Hill Bioventures Sdn Bhd* [2020] 4 CLJ 15.

[40] Under the guarantee, the defendants are the 'surety', Yusen Jaya is the 'principal debtor or principal person' and the COH is the 'creditor or guaranteed person'. The guarantee given by the defendants, the 'surety', to the COH, the 'guaranteed person', was to ensure the full completion of the housing project within the stipulated time and for the due performance of the several obligations of Yusen Jaya, the 'principal person' in relation to the completion of the housing project and in the guarantee, defendants agreed to indemnify the plaintiffs against loss and damage caused to them arising or resulting from Yusen Jaya's failure to complete the project within the stipulated time for completion, or its breach of obligations thereto. In short, the COH has a proprietary right or a chose in action to act against the defendants and can seek to enforce the right or the chose in action under the guarantee against the defendants.

[41] Therefore, we are of the opinion that if the COH wishes to assign his right or chose in action against the defendants to the plaintiffs, he can do so on the basis that the plaintiffs have a genuine commercial interest in the enforcement of the claim against the defendants. On a proper reading of the

DOA 2015, the clear intention of the parties was that the COH's rights to the chose in action to be absolutely transferred to the plaintiffs. Having acquired the chose in action pursuant to the DOA 2015, the plaintiffs can step into the shoes of the COH. The plaintiffs have a good cause of action against the defendants and can independently bring the action against the defendants under the guarantee.

[42] Finally, we will address the issue that was heavily harping upon by counsel for the defendants in his argument that is, the COH cannot assign his statutory duty to the plaintiffs. Counsel for the defendants argued that the DOA 2015 was a statutory document issued to the COH by the defendants as required under the 1978 Enactment. Therefore, it is not a commercial document *per se*. Hence, the COH could not assign his statutory duty or right to the plaintiffs to do a statutory act and if the assignment is valid, the COH does not even have any residual power left to control since he has wholly abdicated his statutory power to the plaintiffs. Counsel for the defendants further argued that it is trite law that unless the statute expressly provides so, assignment of statutory power cannot be done. He relied on Federal Court cases in *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162; [2020] 1 MLJ 281 (*Ang Ming Lee*'s case) and *Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265; [2005] 3 MLJ 97 (*Palm Oil Research*'s case).

[43] With due respect, we are not in agreement with counsel for the defendants' submission on this issue. The Federal Court cases referred to by counsel for the defendants are distinguishable. In *Ang Ming Lee*'s case, the issue before the Federal Court was whether the Controller could grant an extension of time to a developer. The Federal Court found that the Controller could not grant such an extension on the reason that the Minister could not delegate to the controller what it could regulate under the Act 118. Meanwhile, in *Palm Oil Research*'s case, it reiterates an important principle that a subsidiary legislation such as the *Gazette* order cannot enlarge the mother Act. Furthermore, a provision in a statute conferring power on a member of the Executive to enact subsidiary legislation must be construed strictly, particularly where the subsidiary legislation is one that imposes a financial levy, be it tax or charge or cess, upon the whole or any section of the public.

[44] In the present appeal before us, the COH merely assigned his right or the chose in action to the plaintiffs to enable them to commence legal action against the defendants under the guarantee. That's all. There is no delegation of power under the 1978 Enactment or under the 1980 Rules involved as compared to the facts of the cases decided by the Federal Court in *Ang Ming Lee*'s case or in *Palm Oil Research*'s case.

[45] Therefore, we are of the considered view that the LHCJ was right in holding that the DOA 2015 was a valid legal assignment and had complied with all conditions as required under subs. 4(3) of the CLA 1956. The plaintiffs have legally acquired the chose in action that was transferred from the COH under the DOA 2015 to file an action against the defendants to materialise the judgment sums.

The Interpretation Of The Guarantee

[46] For ease of reference and for better understanding of the terms used in the guarantee, we produced the guarantee in whole as follows:

Letter Of Guarantee Of Completion Of Housing Development By Directors

To,
The Controller Of Housing,
Ministry Of Local Government And Housing,
88999 Kota Kinabalu

In consideration of you granting a developer's licence, advertisement and sale permit for the housing at Development Project Known As Taman Bukit Saujana at C.L. T.L No. 01514525 Situated At Jalan Bantayan, Off Jalan Tuaran Mile 3 1/2, Kota Kinabalu. Sabah to our company duly incorporated in Malaysia, housing developer having its registered office at Lot 2215, Section 66, Jalan Bengkel, Off Jalan Utama, Pending Industrial Estate, 93450 Kuching, Sarawak.

1. I/We the undersigned being the directors of the said company, housing developer, hereby jointly and severally guarantee the due performance of the several obligations of the said company, housing developer, and will ensure the full completion of the housing development project as a foresaid until the houses shall have been delivered to the purchasers and certified fit for occupation, within the stipulated period of completion, and in accordance with the Housing Development (Control And Licensing) Enactment 1978 and also any rules made thereunder and any other conditions imposed by the controller of housing from time to time.

2. I/we further hereby agree that l/we shall jointly and severally indemnify the purchasers of the houses against all loss or damage caused to them or any of them arising or resulting from any breach of obligations by the said company, housing developer, or failure to complete the said housing development within the stipulated time of completion.

Dated AT Kuching This 11th Day of June, 2002.

[47] To begin with, we look at the LHCJ's decision in his grounds of judgment (GOJ) related to the interpretation of the terms of the guarantee. At para. [19] of the GOJ, The LHCJ acknowledge that the contents of the guarantee are divided into two parts. In the first part, the defendants agreed to guarantee the due performance of the several obligations by Yusen Jaya and would ensure full completion of the housing project until the delivery of the houses to the purchasers and certified fit for occupation within the

stipulated period of completion. For the second part, the defendants agreed to indemnify the purchasers of the houses against losses arising or resulting from any breach of Yusen Jaya's obligations or its failure to complete the housing project within the stipulated time of completion.

[48] In reference to the plaintiffs' claim, the LHCJ posted the following question:

> [22] The question I have to answer, is firstly, whether in the second part of the guarantee, the defendants had agreed to indemnify the purchasers/ the plaintiffs against all losses and damages incurred as the result of the breaches of the SPA entered into between the plaintiffs and Yusen Jaya (hereafter referred to as "the First Interpretation"). Alternatively, whether the defendants only agreed to indemnify the purchasers/the plaintiffs for losses which they may suffer arising out of Yusen Jaya's failure to complete the Project and for the payment of LAD in the event of delay in the completion of the same? (hereafter referred to as "the Second Interpretation").

His Lordship chose to favour the second interpretation as stated in para. [23] of the GOJ, namely, to indemnify the plaintiffs for losses which they may have suffered in the event that the housing project is uncompleted or if completed, to indemnify the plaintiffs for the LAD which they have suffered. He gave the following reasoning:

> [24] Firstly, the heading of the guarantee clearly indicated that the purpose of the guarantee was to guarantee the completion of the project. This heading has to be read together with the content of the guarantee (see *Farstad Supply v. Enviroco Ltd* [2010] UKSC 18 p. 87 at p. 93 para 22; *Gurdeep Singh a/l Melkha Singh v. Malaysian Airline System Bhd* [2015] 8 MLJ 24).
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> [25] In respect of the guarantee given by the 1st and second defendants to the Housing Controller, which can be found at paragraph 1 of the guarantee, I find that the guarantee was to ensure the full completion of the Project within the stipulated time for completion, and for the due performance of the several obligations of Yusen Jaya in relation to the completion of the Project.
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> [26] Likewise, the indemnity given by the 1st and second defendants to the Housing Controller, which can be found at paragraph 2 of the guarantee, the same must be read within the context of the guarantee to the Housing Controller to complete the Project (at paragraph 1 of the guarantee). It was to indemnify the purchasers/plaintiffs against loss and damage caused to them arising or resulting from Yusen Jaya's failure to complete the Project within the stipulated time for completion, or its breach of obligations in relation thereto.

[49] On the intention of the Legislature to impose conditions on the directors of the housing developers' company to agree to indemnify the house buyers, the LHCJ's opinion is as follows:

A [30] It must not be the intention of the Legislature to impose on the individual directors an agreement to indemnify the purchasers of all the obligations which the developer had undertaken under the sale and purchase agreements, bearing in mind that a company is a separate legal entity from its shareholders and directors. If such were the intention of the Legislature, they would have made the directors of the developer
B company a party to the prescribed form of sale and purchase agreement for the housing development. They did not do so.

Then, the LHCJ made the following observation and conclusion:

[31] The plaintiffs' claim in the Suit K79 was in fact not in respect of
C Yusen Jaya's failure to complete the Project. Their claims were principally for damages suffered for the poor construction of the houses and for late delivery of possession.

[32] I also note that the learned trial Judge in Suit K79 found that the defects in the houses built could not be remedied without completely demolishing them and rebuild them from ground up. In such a case, the
D plaintiffs were clearly entitled to say there was a total failure of consideration and elect to rescind the sale and purchase agreements. They were then entitled to claim for the return of the purchase prices paid to the Yusen Jaya under s. 40 of the Contracts Act, 1950.

[33] The plaintiffs in the Suit K79 instead chose to affirm the sale and
E purchase agreements, accepted completion of the houses and sued for LAD and damages for the defective works. In such a case, the damages awarded in Suit K79 was not for Yusen Jaya's failure to complete the Project, except that a small part of the Judgment sum, namely the sum of RM305,681.67 was awarded for LAD for failure to complete the houses within the stipulated period of completion.

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[34] In view of my above interpretation of the agreement to indemnify in the second part of the guarantee, I find that the defendants had not agreed to indemnify the plaintiffs for losses which they may have suffered as a result of Yusen Jaya's breaches of the SPA, save to complete the Project within the stipulated time of completion. And I recognize that the
G plaintiffs had received a sum of RM1,338,728.00 as partial settlement of the Judgment sum awarded in the K79 Suit. This was revealed during the cross-examination of PW1 that the Housing Controller had called upon the bank guarantee furnished by Borneo Housing Mortgage Finance on behalf of Yusen Jaya. This sum for partial settlement had exceeded the LAD awarded in Suit K79, which is RM305.681.67.

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[50] Now, the first thing to do is to look at the terms of guarantee. The language used in the guarantee is vital. The liability of the guarantor depends very much on the language of that instrument and the nature of the liability it creates. Thus, if the language of the guarantee is clear, its plain and ordinary meaning must be given. See Supreme Court decision in *YM Orang*

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Kaya Menteri Paduka Dato' Wan Ahmad Isa Shukri Wan Rashidi v. Kwong Yik Bank Bhd (2) [1989] 2 CLJ 1288; [1989] 1 CLJ (Rep) 187; [1989] 3 MLJ 155 (*Orang Kaya Menteri Paduka*'s case) which was referred to by the Federal Court in *The Pacific Bank Bhd v. Kerajaan Negeri Sarawak* [2015] 3 CLJ 717; [2014] 6 MLJ 153.

[51] In interpreting the guarantee, we are guided by the Federal Court's decision in *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597. At p. 296 (CLJ); pp. 620 and 621 (MLJ), the Federal Court held that:

> [42] Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines. First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix forming the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract. See *Investors Compensation Scheme Ltd v. West Bromwich Building Society Investors Compensation Scheme Ltd v. Hopkins & Sons (a firm) & Ors Alford v. West Bromwich Building Society & Ors Armitage v. West Bromwich Building Society & Ors* [1998] 1 All ER 98. As Lord Clyde said in *Bank of Credit and Commerce International SA (in liquidation) v. Aii & Ors* [2001] 2 WLR 735:
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> > The knowledge reasonably available to them (that is to say the parties to the contract) must include matters of law as well as matters of fact. The problem is not resolved by asking the parties what they thought they intended. It is the imputed intention of the parties that the court is concerned to ascertain. The parties may well have never applied their minds to the particular eventuality which has subsequently arisen, so that they may never in fact have had any conscious intention in relation to that eventuality. It is an objective approach which is required and a solution should be found which is both reasonable and realistic. The meaning of the agreement is to be discovered from the words which they have used read in the context of the circumstances in which they made the agreement. The exercise is not one where there are strict rules, but one where the solution is to be found by considering the language used by the parties against the background of the surrounding circumstances.

[52] The background knowledge of the parties to the guarantee must be considered in determining the intention behind it. This background knowledge can be evaluated from the evidence adduced or by inference made from the circumstantial evidence before the court. The background knowledge can include anything which would have affected the way in which the wordings were used in the guarantee. In *Orang Kaya Menteri Paduka*'s case the Supreme Court had observed that:

A ... The document in question, that is, the letter of guarantee signed by the third defendant, like every other guarantee, must be construed according to the intention of the parties as expressed by the language they have employed, understanding it fairly in the sense in which it is used. This intention is best ascertained by looking to the relative position of the parties at the time the letter of guarantee is written. ...

B **[53]** Another element to consider as regards to knowledge or the intention of the contracting parties in a contract of guarantee is the nature of the dealing or the business involved. Where it is clear from the background of the case that the contracting parties involved in a commercial dealing, the interpretation of the language or the words used in the instrument has to be C interpreted according to the business common sense and must also meet the reasonable expectation of a sensible businessman. See the Court of Appeal decision in the case of *MBf Insurans Sdn Bhd v. Lembaga Penyatuan Dan Pemulihan Tanah Persekutuan (FELCRA)* [2007] 6 CLJ 639.

D **[54]** Looking at the guarantee as a whole, without doubt, in its plain and ordinary meaning means that the defendants have jointly and severally agreed to guarantee the due performance of Yusen Jaya. They will ensure the full completion of the housing project until the delivery of the houses to the buyers with the certification of fitness for occupation within the stipulated E time as agreed. It did not stop there. The defendants also agreed to jointly and severally indemnify the plaintiffs for any loss or damage caused to them or any of them if Yusen Jaya breaches its obligations under the SPA or fails to complete the housing project within the time frame specified.

[55] With respect, we are unable to accept the LHCJ's interpretation on the F construction of the guarantee. Even though the guarantee consists of two clauses, it must be read in harmony. The words "I/We Further Hereby Agree" at the beginning of the second clause indicate that both clauses must be read conjunctively. By splitting the interpretation of the terms of the guarantee into two parts as what was done by the LHCJ, we are of the view G that His Lordship could not properly address his mind to find the real plain and ordinary meaning of the clauses in the guarantee in relation to the nature of the liability shouldered by the defendants under the guarantee. Upon proper reading of the terms of the guarantee, we find that the defendants had agreed to jointly and severally:

H (i) guarantees the due performance of the several obligations of Yusen Jaya;

(ii) ensure the full completion of the housing project up to the delivery of the houses to the buyer together with the certificate of fitness for occupation within the stipulated time; and

I (iii) indemnify the plaintiffs against all loss or damage caused to them or any of them arising or resulting from any breach of obligations by Yusen Jaya, or failure to complete the said housing development within the stipulated time.

[56] As noted earlier, the Act 118 or in our case, the 1978 Enactment is a social legislation. All requirements under the law should be interpreted in line with the purpose or the intention of the legislator who passed the law. One of the requirements is that the directors of a housing development company have to give an undertaking *via* a formatted letter of guarantee specified under the law before a licence for the housing development is issued. The rationale behind the requirement is easy to understand. It must be interpreted that the guarantee given by the directors is not just a lip-service. It provides a measure of protection to house buyers against unscrupulous developers. We find that the LHCJ failed to take a purposive approach in interpreting the guarantee.

[57] Finally, we also find that the LHCJ failed to take into consideration the background facts of the contracting parties in his interpretation of the guarantee. The defendants are the directors of a housing developer company. It is undisputed that the guarantee was issued by the defendants to the COH in compliance with the 1978 Enactment and the 1980 Rules to secure a licence for Yusen Jaya to develop the housing project. As a director of Yusen Jaya, the defendants should know the purpose of such requirement under the law and should foreknow the risk that they have to bear if Yusen Jaya fails to deliver the houses in the housing project to the plaintiffs on time or fails to observe its obligations under the SPA.

Whether the Plaintiffs' Claim Barred By Limitation

[58] Counsel for the defendants submitted that even if the defendants are liable to the plaintiffs under the guarantee and the DOA 2015, the plaintiffs' claim is barred by the s. 3 of the SLO. It was argued that if the COH has a claim against the defendants under the guarantee to indemnify him against all loss or damage caused to the plaintiffs by Yusen Jaya as alleged at para. 10 of the plaintiffs' statement of claim, the plaintiffs ought to have claimed against the COH when the housing project was not completed until 2005 or at the latest when the plaintiffs commenced their K79 suit in 2006. Therefore, the COH ought to have claimed against the defendants at the same time. Instead, the plaintiffs only commenced this action in September 2015, which is 11 years later. The limitation governing a breach of a written contract under SLO is only six years. Counsel for the defendants referred to items 94 and 95 of the Schedule of the SLO and the Court of Appeal decision in *Bounty Dynamics Sdn Bhd v. Chow Tat Ming & Ors* [2015] 9 CLJ 422; [2016] 1 MLJ 507.

[59] In reply, counsel for the plaintiffs argued that the respondents' contentions have no merit on the reason that paragraph two of the guarantee which is the indemnity clause that the plaintiffs are claiming under requires that liability of the Yusen Jaya be first established by judgment and time will

A only begin to run from the date of establishing the liability. In support of this proposition, counsel for the plaintiffs rely on the Privy Council decision in *Loh Wai Lian v. S.E.A. Housing Corporation Sdn Bhd* [1987] 1 LNS 37; [1987] 2 MLJ 1, that is, in the event that a housing developer fails to complete and deliver vacant possession of the building within 18 months from the date of
B the agreement, the cause of action accrues not at the expiration of 18 months from the date of the agreement, but only when the damages due under the indemnity can be calculated and ascertained. In other words, until that sum has been ascertained, it does not become due and cannot be sued for.

[60] On the issue of the statutory limitation under the SLO, we are of the
C considered view that the plaintiffs' claim against the defendants is not barred by limitation. We agree with the counsel for the plaintiffs' contention that the judgment sums awarded to the plaintiffs against Yusen Jaya in Suit K-79 was given on 27 January 2011. Then, the plaintiffs entered into the DOA 2015 with the COH on 10 February 2015 and thereafter, the plaintiffs filed
D their action in the High Court on 14 September 2015 to enforce the guarantee against the defendants. On those facts, we are of the view that the time started to run against the plaintiffs to take action against the defendants from the date of the DOA 2015, that is, the date when the plaintiffs acquired the right or the chose in action from the COH.

E **Conclusion**

[61] Based on the reasons adumbrated above, we unanimously find and held that there are merits in the plaintiffs' appeal which warrant appellate intervention. We allow the plaintiffs' appeal with costs. We set aside the High Court judgment.

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[62] As to the amount of the judgment sums, it is not disputed that the plaintiffs had received a sum of RM1,338,728 from the bank guarantee furnished by Borneo Housing Mortgage Finance on behalf of Yusen Jaya that had been called upon by the COH. Therefore, the defendants are jointly and
G severally liable to pay the amount of RM3,253,644.67 being the balance of the judgment sums awarded in Suit K-79 to the plaintiffs with the interest of 5% per annum from the date of filling of the writ, that is 14 September 2015.

[63] As for costs, we awarded a sum of RM50,000 here and below to be paid by the defendants to the plaintiffs, subject to allocator.

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